

## **TENTATIVE ORDER REGARDING MOTION FOR DISPOSITION**

Defendants Siemens Government Technologies, Inc. (“Siemens Government”) and Siemens Industry, Inc. (together, the “Siemens Defendants”) moved for an order allowing disposition of the thermal converter. Docket No. 162. For-Use Plaintiff Integrated Energy, LLC (“Integrated Energy”) opposed. Docket No. 166. The Siemens Defendants replied. Docket No. 168.<sup>1</sup>

For the following reasons, the Court **denies** the motion.<sup>2</sup>

### **BACKGROUND**

The allegations in this case are well-known to the parties and detailed in the Court’s prior order on the motion to dismiss. Docket No. 145. Most relevant to this motion is that Siemens Government entered into an Energy Savings Performance Contract with the United States Army at Fort Irwin, an army base in San Bernadino County. Fourth Amended Complaint (“FAC”), Docket No. 88, ¶¶ 36–37¶ 25. The Siemens Defendants then subcontracted with Integrated Energy to provide a thermal converter, which would convert solid waste into ash; the ash would then be landfilled or repurposed. *Id.* ¶ 26. The Siemens Defendants allegedly made false and disparaging statements regarding the converter’s functionality and safety. *Id.* ¶ 161, 164. In contrast, the Siemens Defendants’ First Amended Counterclaim alleges that the thermal converter was defective and that it did not meet the subcontract’s specified performance requirements. Docket No. 77 ¶¶ 27, 40. They further allege that the thermal converter would require significant expense to redesign. *Id.* ¶ 42.

On March 21, 2016, the Court held a hearing on the Siemens Defendants’

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<sup>1</sup> The Court also notes the Government’s objection to any testing at the Fort Irwin base. Docket No. 173. Integrated Energy replied. Docket No. 174.

<sup>2</sup> The Siemens Defendants ask the Court to strike a paragraph on page three of Integrated Energy’s opposition. Reply at 10. This paragraph does not impact the Court’s analysis; therefore, it does not rule on the request.

motion to dismiss the first amended complaint. Docket No. 44. At the hearing, the Court stated:

Well, it will be reflected in the minute order today no dismantling of the system without a prior order of the Court. They should give you an opportunity to inspect and then apply to the Court for whatever relief you think is appropriate under the law in terms of testing.

Decl. of John Van Loben Sels (“Loben Sels Decl.”), Ex B, 21:18–23.

On February 1, 2017, Siemens Government received a Notice of Full Termination For Convenience of its contract from the Contracting Officer for the Army. Decl. of Janet Pennington (“Pennington Decl.”) ¶ 3. The Contracting Officer directed Siemens Government to dismantle and remove the waste-to-energy facility at Fort Irwin. *Id.* ¶ 4. Siemens Government has begun closing out the contract and must remove the entire facility, including the thermal converter. *Id.* ¶ 5.

As a result, the Siemens Defendants now ask the Court to set aside its earlier oral order. Mot. at 7–8. They ask that the Court allow Siemens Government to “dismantle, remove, and scrap the thermal converter[.]” Mot. at 7–8. Alternatively, they ask the Court to allow them to remove the thermal converter from Fort Irwin. *Id.* at 8.

## **LEGAL STANDARD**

Federal courts have inherent power to require parties to preserve evidence. Am. LegalNet, Inc. v. Davis, 673 F. Supp. 2d 1063, 1071 (C.D. Cal. 2009). Courts apply a three-part balancing test when determining whether to require preservation:

1) the level of concern the court has for the continuing existence and maintenance of the integrity of the evidence in question in the absence of an order directing preservation of the evidence;

2) any irreparable harm likely to result to the party seeking the preservation of evidence absent an order directing preservation; and

3) the capability of an individual, entity, or party to maintain the evidence sought to be preserved, not only as to the evidence's original form, condition or contents, but also the physical, spatial and financial burdens created by ordering evidence preservation.

Id. at 1072 (quoting Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp., 220 F.R.D. 429, 433–34 (W.D. Pa.2004)); see also Treppel v. Biovail Corp., 233 F.R.D. 363, 370 (S.D.N.Y. 2006).<sup>3</sup>

## ANALYSIS

### **I. The motion is properly brought.**

Integrated Energy argues that this is a discovery dispute that should have been brought before the magistrate judge because the thermal converter is the subject of an outstanding discovery request for inspection and testing. Opp'n at 3–4 (citing Van Lobens Sel Decl., Ex. A). Regardless of whether this qualifies as a discovery issue, this Court ordered the Siemens Defendants to refrain from dismantling the system without further authorization from this Court. Therefore, only this Court has the power to modify the order.

### **II. The Court will not permit disposition at this time because doing so would destroy potentially necessary evidence.**

The Siemens Defendants argue that they must dismantle and remove the

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<sup>3</sup> Although American LegalNet also addresses the Court of Claims' two-prong standard, California district courts generally apply the three-factor balancing test. See, e.g., Artec Grp., Inc. v. Klimov, No. 15-CV-03449-RMW, 2016 WL 4474614, at \*2 (N.D. Cal. Aug. 25, 2016); Bright Sols. for Dyslexia, Inc. v. Doe 1, No. 15-CV-01618-JSC, 2015 WL 5159125, at \*2 (N.D. Cal. Sept. 2, 2015). Furthermore, any distinction between the tests is "more apparent than real." Am. LegalNet, 673 F. Supp. 2d at 1072 (quoting Treppel, 233 F.R.D at 370).

thermal converter under their contract with the Army. Mot. at 4–7. They rely on Federal Acquisition Regulations, including 49.104(I), which requires contractors to “[d]ispose of termination inventory[.]” In response, Integrated Energy argues that the Siemens Defendants seek to destroy relevant evidence. Opp’n at 4–7. The Court addresses these arguments under the three factors discussed above.

**A. The “continuing existence of the evidence” factor favors preservation here because the Siemens Defendants will dismantle the converter if the Court grants the motion.**

The first factor favors Integrated Energy because the Siemens Defendants seek to dismantle the thermal converter. The thermal converter is relevant to Integrated Energy’s allegations that the Siemens Defendants disparaged Integrated Energy for not providing an appropriate converter. See, e.g., FAC ¶¶ 25, 161, 164. Likewise, the converter is relevant to the Siemens Defendants’ counterclaim because they allege that Integrated Energy breached the subcontract by not providing a safe and operational converter. See Docket No. 77 ¶¶ 27, 40.

The Siemens Defendants argue that the thermal converter is no longer relevant because of the Army’s notice for termination. Mot. at 5. First, the Siemens Defendants argue that the converter’s operability no longer matters “because no further work will ever be performed on the project and no part of the WTE facility at Fort Irwin will ever be completed and operated.” Mot. at 5. But this does not render the factual dispute about the converter’s operability moot — both parties’ allegations focus on whether the thermal converter met the contract’s requirements. See FAC ¶ 25, 161, 164; Docket No. 77 ¶ 27, 40, 42. Therefore, the thermal converter’s operational capabilities remain relevant.

Therefore, if the Court grants the motion then relevant evidence will be destroyed.

**B. Integrated Energy will likely suffer irreparable harm if the Court grants the motion because it will lack the evidence necessary to prove its allegations and defeat the Siemens Defendants’ counterclaim.**

The second factor also favors Integrated Energy because it will not be able to obtain evidence from the thermal converter if the Siemens Defendants dismantle

it. To prove its allegations and defeat the Siemens Defendants' counterclaim, Integrated Energy will probably have to show that the thermal converter worked as designed. Therefore, dismantling the converter would deprive Integrated Energy of evidence necessary to its case.

The Siemens Defendant argue that, because of the Army's termination for convenience, Integrated Energy's monetary recovery depends on certain subcontract provisions . Mot. at 6–7. Because the subcontracts limit recovery, “whether the thermal converter will safely and soundly operate over its projected useful life is immaterial now[.]” *Id.* at 7. But regardless of whether the subcontracts impact Integrated Energy's recovery, the Siemens Defendants have brought their own counterclaim for breach of contract. Docket No. 77. This counterclaim depends on the thermal converter's inoperability. Therefore, dismantling the thermal converter would likely destroy evidence necessary to Integrated Energy's defense.

**C. Although the Siemens Defendants will shoulder a burden preserving the thermal converter, they have not shown that this burden outweighs the damage to the evidence and irreparable harm to Integrated Energy that would ensue if they dismantled the converter.**

The Court finds that the third factor weighs in favor of the Siemens Defendants, but does not outweigh the other two factors. The Siemens Defendants argue that they must dismantle the thermal converter by May 2017, to conform with the Army's notice of termination, the contract, and the applicable Federal Acquisition Regulations. Mot. at 4; Pennington Decl. ¶ 5, 7. But this contractual obligation does not override their obligation to preserve evidence. Furthermore, the Siemens Defendants argue that they will incur significant expense if they must extend the converter's removal, but do not provide any details for the Court. See Pennington Decl. ¶¶ 7–8.

Finally, Integrated Energy has requested testing and the Siemens Defendants have objected to the request. Loben Sels Decl., Ex. A; Craig Reply Decl. Ex. 1, 2. If the parties can quickly resolve — either through a meet-and-confer process or a motion before the magistrate judge — how to test the thermal converter (whether at Fort Irwin or at another site) then the Siemens Defendants

will not bear as significant of a burden. In this regard, the parties should be prepared to discuss with the Court at oral argument the feasibility of immediately convening the parties' retained experts and consultants to discuss testing and/or preservation, including preservation at another site.

In sum, the Court will not permit the destruction of very relevant evidence without a further attempt by the parties to preserve the evidence or a more robust showing by the Siemens Defendants that the cost of preservation outweighs the converter's relevance.

### **CONCLUSION**

For the foregoing reasons, the Court **denies** the motion.